85-1782

SUPREME COURT, U.S.
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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

MITSUE TAKAHASHI,
Petitioner

VS

BOARD OF TRUSTEES OF LIVINGSTON UNION SCHOOL DISTRICT, FRED KISHI, DENNIS STEFENSEN, JANET MARTIN, CHARLA SOTO, AND ROBERT WEIMER, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE BOARD OF TRUSTEES OF LIVINGSTON UNION SCHOOL DISTRICT,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether state court affirmance of a decision rendered upon a teacher's administrative discharge hearing bars a federal court action challenging the school district's teacher evaluation process and teacher's dismissal on constitutional grounds not considered at the administrative hearing.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

MITSUE TAKAHASHI,
PETITIONER,

vs.

BOARD OF TRUSTEES OF LIVINGSTON UNION SCHOOL DISTRICT, FRED KISHI, DENNIS STEFENSEN, JANET MARTIN, CHARLA SOTO, and ROBERT WEIMER, in their official capacities as members of the BOARD OF TRUSTEES OF LIVINGSTON UNION SCHOOL DISTRICT,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner MITSUE TAKAHASHI respectfully prays that a writ of certiorari issue to review the decision of the Court of Appeals for the Ninth Circuit entered in the above-entitled action on February 21, 1986.

OPINIONS BELOW

On January 3, 1985, the United States District Court for the Eastern District of California granted defendants' motion for dismissal or summary judgment on the grounds of res judicata. The Order Granting Defendants' Motion to Dismiss is printed in Appendix A, infra, page 1. Judgment was entered for defendants on Februray 5, 1985. That Judgment is printed in Appendix A, infra, page 14.

The United States Court of Appeals for the Ninth Circuit affirmed the judgment of the United States District Court on February 21, 1986. The Opinion of the Court of Appeals is printed in Appendix A, infra, page 16.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fourteenth Amendment to the United States Constitution.

2. 42 U.S.C. §§ 1981 and 1983.

3. California Education Code §§ 44660 and 44662.

The full text of these constitutional and statutory provisions is set out in Appendix B, infra.

STATEMENT OF CASE

Petitioner MITSUE TAKAHASHI, a United States citizen of Japanese ancestry and a graduate of Stanford University, had been employed by respondent LIVINGSTON UNION SCHOOL DISTRICT for twenty years when she was discharged from her junior high school teaching position for incompetence. Although petitioner had been consistently successful in insuring that all her students met or exceeded each and

every academic goal established by respondents, in 1980 a new administration decided that she was an inadequate disciplinarian and sought to discharge her for failure to maintain a suitable learning environment. Appendix C, infra.

The California Teachers Association requested a hearing before the Commission on Professional Competence of respondent LIVINGSTON UNION SCHOOL DISTRICT alleging that petitioner's dismissal violated the Stull Act, particularly California Education Code §§ 44660 and 44662. The sole issues presented to the Commission were whether cause existed for petitioner's discharge as defined by California law and whether respondents had complied with the statutory procedures for dismissing permanent teachers. The Association did not raise any of petitioner's federal constitutional claims before the Commission. On November 16, 1980, the Commission issued its

decision concluding that state procedural mandates had been followed and dismissing petitioner from her teaching position.

Thereafter the California Teachers Association filed a petition for writ of mandate in the Superior Court for the County of Merced, State of California, to vacate the decision of the Commission on the grounds that respondents had not complied with the mandate of the Stull Act in dismissing petitioner. On June 9, 1981, the Superior Court denied the Association's petition for writ of mandate. That denial was appealed to the Court of Appeal of the State of California in and for the Fifth Appellate District, which agreed with the Association that respondents had failed to comply with the California education law in dismissing petitioner but affirmed the lower court's denial of the Association's petition for writ of mandate.

On August 17, 1983, the California Supreme

Court denied petitioner's request for hearing, R. Bird, C.J., dissenting, and subsequently this Court denied a petition for writ of certiorari. 104 S. Ct. 1007 (1984).

On November 10, 1983, petitioner TAKAHASHI filed a Complaint in the United States District Court for the Eastern District of California alleging that respondents had utilized discriminatory methods of evaluating petitioner's job performance on account of her ethnic origin and gender and pursuant to standards which were impermissibly vague.

On February 27, 1984, a status conference was held at which the District Court instructed respondents to immediately file a motion to dismiss or for summary judgment on the grounds of res judicata. The court granted respondents' motion and entered judgment for respondents on February 5, 1985.

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT IN THE CASE AT BAR IS IN DIRECT CONFLICT WITH THE OPINIONS OF OTHER CIRCUIT COURTS REGARDING A SUBSTANTIAL AND IMPORTANT FEDERAL QUESTION

The decision of the Court of Appeals for the Ninth Circuit that state court affirmance of an administrative discharge hearing bars a federal court action raising claims of discrimination not considered at that hearing directly conflicts with the recent holding of the Court of Appeals for the Second Circuit in Bottini v. Sadore Management Corp., 764 F. 2d 116 (2nd Cir. 1985).

In Bottini v. Sadore Management Corp., supra, Bottini appealed the company's termination of his employment to an arbitrator, who concluded after an arbitration hearing that good cause existed for the discharge. Bottini

challenged the arbitrator's opinion in a state court action which ultimately affirmed the arbitration decision. Subsequently he filed a complaint in federal court for violation of Title VII of the Civil Rights Act of 1964 alleging that he had been discharged because he was a Jehovah's Witness. The trial court dismissed his complaint on res judicata grounds but the Court of Appeals for the Second Circuit determined that the state court affirmance of the arbitration award did not bar Bottini's federal suit.

Of crucial importance to the court in Bottini v. Sadore Management Corp., supra, was the fact that Bottini's discrimination claims had not been raised in the arbitration hearing. As the court noted, the "arbitration award in the instant case gives no indication that any evidence was submitted to or considered by the arbitrator on Bottini's religious discrimination claim." 764 F. 2d at 121. As in the

case at bar, the administrative hearing and the state court litigation in Bottini v. Sadore Management Company, supra, dealt solely with the issue of good cause for the discharge.

In fact, according to the Bottini court, the religious discrimination claim was "outside the scope of the arbitration proceeding" since the issue before the arbitrator, as before the Commission in the case at bar, was whether the employer could show good cause for the discharge. 764 F. 2d at 121. Moreover, since the judicial review of the arbitration award was narrowly limited, as was the mandamus proceeding in the case at bar, the court could not consider discrimination claims not raised at the administrative level. 764 F. 2d at 121.

Thus, the Bottini court concluded that the cause of action adjudicated in the state court proceeding was not the same claim asserted in the federal court suit even though both arose from the termination of Bottini's employment.

This is the very argument advanced by petitioner in the case at bar and rejected by the Court of Appeals for the Ninth Circuit.

In fact, the position of petitioner TAKAHASHI is even stronger than that of Bottini on this issue since the main thrust of petitioner's federal court action is its challenge to the teacher evaluation process, a claim totally outside the purview of the administrative hearing.

Although the United States Supreme Court has not ruled on the precise issue raised by the case at bar, its approach to similar res judicata problems is consistent with the reasoning of Bottini v. Sadore Management Corp., supra, rather than with the Court of Appeals for the Ninth Circuit.

For example, in McDonald v. City of West Branch, Mich., _____U.S. ____, 80 L. Ed. 2d 302, 104 S. Ct. 1977 (1984), this Court recently reaffirmed the holding of Alexander v.

Gardner-Denver Company, 415 U.S. 36, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974) that a decision rendered at an arbitration hearing does not bar a subsequent 42 U.S.C. § 1983 claim arising out of the same termination of employment challenged in the administrative proceeding.1/

In McDonald v. City of West Branch, Mich., supra, the Court of Appeals for the Sixth Circuit held that an arbitration award which found good cause for the dismissal of a city police officer precluded a federal court suit alleging that the discharge had resulted from the officer's exercise of his constitutional rights.

In unanimously reversing the decision of

1/ This Court has demonstrated its continuing concern with res judicata issues by recently granting certiorari in Elliot v. Univ. of Tennessee, 766 F. 2d 982 (6th Cir. 1982), cert granted, 88 L. Ed. 2d 455. (December 3, 1985).

the Court of Appeals for the Sixth Circuit, this Court noted that an arbitrator may not have the "expertise required to resolve the complex legal issues that arise in § 1983 actions", 80 L. Ed. 2d at 308, an argument which was implicitly rejected by the Court of Appeals in the case at bar.

Moreover, according to this Court,

> ...when, as is usually the case, the union has exclusive control over the manner and extent to which an individual grievance is presented (citation omitted), there is additional reason why arbitration is an inadequate substitute for judicial proceedings. The union's interests and those of an individual employee are not always identical or even compatible. As a result, the union may present the employee's grievance less vigorously, or make different strategic choices, than would the employee... thus, were an arbitration award accorded preclusive effect, an employee's opportunity to be compensated for a constitutional deprivation might be lost merely because it was not in the union's interest to present the claim vigorously. 80 L. Ed. 2d at 309.

That observation is particularly applicable to the case at bar in which it was petitioner's union, the California Teachers Association, and not petitioner who challenged the dismissal and who raised only state law claims at the administrative and state court levels.

This Court's conclusion in McDonald v. City of West Branch, Mich., supra, that an arbitration proceeding "cannot provide an adequate substitute for a judicial trial" is also important for the case at bar. 80 L. Ed. 2d at 309. (emphasis mine).

The only difference between McDonald v. City of West Branch, Mich., supra, and the case at bar is that in the former action the administrative decision was not given the imprimatur of a court judgment while in the latter it was. This Court's reasoning, however, suggests that such difference is not significant when the court is simply reviewing

the validity of an administrative finding based upon the administrative record rather than according the litigant a "judicial trial." 80 L. Ed. 2d at 309. In fact, it was this reasoning that the Court of Appeal for the Second Circuit found to be compelling in Bottini v. Sadore Management Corp., supra.

Similarly, in Goldsmith v. DuPont Co., 32 F.E.P. Cases 1879 (D.Del. 1983), the court ruled that state court affirmation of a decision of the Unemployment Insurance Appeals Board that an employee was discharged for good cause did not bar a subsequent federal court action for violation of Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981 arising out of the same employment termination because the causes of action in the two cases were different. See also Whitfield v. City of Knoxville, 756 F. 2d 455 (6th Cir. 1985.)

The decision of the Court of Appeals for the Ninth Circuit in the case at bar is also

in conflict with earlier rulings of the Ninth Circuit and the California Supreme Court.

For example, in Gallager v. Frye, 631 F. 2d 127 (9th Cir. 1980), the court ruled that a mandamus action in state court did not bar a 42 U.S.C. § 1983 suit in federal court even though both cases arose out of the employee's discharge as a curator for the Oakland museum.

The decision in the case at bar neither followed the clear precedent established by Gallagher v. Frye, supra, nor sought to distinguish it in any manner.

Since the federal court must be guided by state law in determining the preclusive effect of an earlier judgment, Migra v. Warren City School District Bd. of Educ., ____ U.S. ____, 104 S. Ct. 892 (1984), the opinions of the California Supreme Court are also of precedential significance. Such decisions were not accorded due weight in the conclusion of the Court of Appeal in the instant case. For

example, in Argarwal v. Johnson, 25 Cal. 3d 932, 160 Cal. Rptr. 141, 603 P. 2d 58 (1979), an employee brought suit in federal court against his former employer alleging a violation of Title VII of the Civil Rights Act of 1964 arising out of the termination of his employment as a systems engineer. Subsequently he filed suit in state court against the same defendant seeking damages for defamation and emotional distress resulting from the employer's discriminatory comments and the same termination of employment.

The California Supreme Court concluded that the judgment in federal court did not bar the state court action because different primary rights were involved in the two suits. It stated:

> While the federal action was based on the same underlying facts as the instant case, it does not follow that the federal court judgment is res judicata. ... Although Argarwal's state court claims for defamation and intentional infliction of

> emotional distress arose in conjunction with the alleged violation of title VII, the fact remains that in the present action he was awarded damages for harm distinct from employment discrimination. 25 Cal. 3d at 954-955.

Likewise, in Daugherty v. Board of Trustees, 111 Cal. App. 2d 519, 244 P. 2d 950 (1952), a dismissed teacher filed a petition for writ of mandate directing the school district to reinstate her to the position of full-time permanent employee and to fix her compensation. Subsequent to obtaining the requested writ, Daugherty filed suit against the district once again for her salary between the time she was dismissed and the date of her reinstatement. In ruling that the first action was not a bar to the second, the court stated:

> [D]efendants seek to apply the principle that a judgment is conclusive of every matter which the parties might have litigated in the action ... Defendants, however, are attempting to stretch this principle too far. ...[T]he rule is not applicable

> to rights, claims or demands, although growing out of the same subject matter, but which constitute separate or distinct causes of action, and which were not put in issue in the former case. 111 Cal. App. 2d at 521-522.

See also Sawyer v. First City Financial Corp. Ltd., 124 Cal. App. 3d 390, 177 Cal. Rptr. 398 (1981); Ball v. Stephens, 68 Cal. App. 2d 843, 850-851, 158 P. 2d 207 (1945); McNulty v. Corp., 125 Cal. App. 2d 697, 707-709, 271 P. 2d 90 (1954); Hall v. Coyle, 38 Cal. 2d 543, 546, 241 P. 2d 236 (1952).

In contrast, the cases cited by the Court of Appeal in the case at bar to support its position involved claims which had been raised and adjudicated in prior hearings. For example, in City of Los Angeles v. Levy, 85 Cal. App. 3d 143, 149 Cal. Rptr. 320 (1978), the court noted that the Memorandum of Contentions of Fact and Law in the federal

district court action were a "paraphrase" of the complaint in state court. 85 Cal. App. 3d at 153.

In Mattson v. City of Costa Mesa, 106 Cal. App. 3d 441, 164 Cal. Rptr. 913 (1980), the employee alleged the same facts in his state court suit as he had asserted in his federal action and made no argument that either his claims or the primary rights he sought to vindicate were different in the state and federal court actions. 106 Cal. App. at 447. See also Holmes v. David H. Bricker, Inc., 70 Cal. 2d 786, 76 Cal. Rptr. 431 (1969); Slater v. Blackwood, 15 Cal. 3d 791, 126 Cal. Rptr. 225, 543 P. 2d 593 (1976); Reichert v. General Insurance Co., 68 Cal. 2d 822, 69 Cal. Rptr. 321, 442 P. 2d 377 (1968).

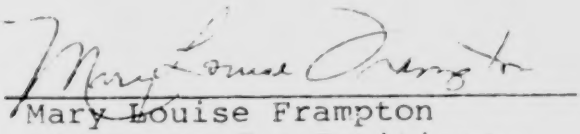
CONCLUSION

For the foregoing reasons petitioner respectfully prays that this petition for a writ of certiorari be granted.

DATED: April 16, 1986.

Respectfully submitted,

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APPENDIX A

D E C I D E D

JANUARY 3, 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MITSUE TAKAHASHI, Plaintiff,	) NO. CV-F-83-501-EDP
vs.	) MEMORANDUM AND ORDER RE DEFENDANTS' MOTION FOR DISMISSAL OR SUMMARY JUDGMENT
BOARD OF TRUSTEES OF LIVINGSTON UNION SCHOOL DISTRICT, et al.,	)

At the direction of the Court at the First Status Conference in this matter, the defendants filed a motion to dismiss the complaint or for summary judgment on the grounds that the judgment entered in the Superior Court of the State of California for the County of Merced, entitled California Teachers Association; Mitsue Takahashi v. Governing Board of the Livingston Union School District, Case No. 6527, on July 9, 1981, is

res judicata as to the issues, claims and causes of action now alleged by the plaintiff in this Court. Defendants further rely on the fact that the Merced Superior Court judgment was affirmed in 144 Cal. App. 3d 27 (5th DCA, 1983) as modified in 145 Cal. App. 3d 451A (5th DCA, 1983). The defendants further point out that the California Supreme Court denied hearing on the matter on August 17, 1983, and the United States Supreme Court declined to grant the plaintiff's requested writ of certiorari in 104 S. Ct. 1007 (1984).

The principal thrust of plaintiff's argument is found in plaintiff's supplemental brief which was filed at the direction of the Court: "The 'primary right' which Takahashi's federal suit seeks to vindicate is the right to have her job performance be evaluated on the same basis, and with the same standards, as those utilized for the teachers in her school not of Japanese descent, and in conformity with

the equal protection clause of the 14th amendment. That primary right was neither litigated nor determined in California Teachers Association v. Governing Board, supra."

Although the defendants moved on alternate grounds, they buttressed their motions with affidavits and declarations which were not answered by the plaintiff by counter-declarations or affidavits. The Court rules on the motion as a motion for summary judgment rather than a Rule 12(b)(6) motion.

We start with the findings of fact and conclusions of law which form the basis of the Superior Court judgment:

> 3. Two separate notices of incompetency were personally served on petitioner on April 24, 1979 and January 8, 1980, respectively. Each of the notices specified the nature of the incompetency and gave specific instances of behavior with such particularity as to furnish to petitioner an opportunity to correct her fault and to overcome the grounds for the charge of incompetency. Each of the notices included an evaluation made pursuant to Article 11, commencing with Section 44660, of Chapter 3 of Part 25 of the Education Code.

8. On January 9, 1978, in petitioner's classroom between 1:00 and 1:45 p.m., petitioner failed to exercise classroom and student control as alleged in paragraph 1 of the statement of charges.

9. On October 16, 1978, at 2:45 p.m., students were playing soccer inside petitioner's classroom, screaming loudly, and running in and out of the room. This activity continued for approximately ten minutes.

10. On November 3, 1978, at 1:05 p.m., students were yelling in class and were disturbing office personnel by yelling over the intercom.

11. On November 17, 1978, at 10:00 a.m., students were observed standing at the backdoor of petitioner's classroom yelling to students on the playground.

12. On May 16, 1979, from 1:00 to 1:15 p.m., in and near petitioner's classroom, three boys were wrestling and yelling outside the backdoor. Students were wandering around the room, visiting and yelling. One boy threw a pencil across the room to a friend, telling him to sharpen it for him. One girl was reading a magazine and told petitioner "she didn't feel like doing work that day." She continued to read the magazine. One girl sat outside for the duration of the period, stating simply that she did not want to go to class.

13. On June 8, 1979, Joe Holt, a maintenance man, overheard vulgar language by various students in petitioner's class and in her presence.

These conversations were lengthy and loud enough for Holt to hear while working under the sink, and caused Holt to stand up to see if petitioner was still in the room.

14. On September 26, 1979, in petitioner's classroom, several conversations not related to the lesson were going on between students while she tried to conduct the lesson. She often asked questions and immediately answered them herself, thus not giving students a chance to answer. The petitioner failed to realize which issues students had strong feelings about, and thus missed great opportunities for discussion. Class time and material were used with no demonstrated objective learning or evaluation.

15. On October 24, 1979, petitioner's class was observed from 10:45 to 11:17 a.m. There was no planning lessons, and no learning objective or focus for the lesson. Her plan book showed few lessons actually planned in advance and clearly determining the objective.

16. On October 23, 1979, a student was transferred to another room so she could resume learning. This student was unable to work effectively in petitioner's classroom because of noise and confusion in the class.

17. On November 14, 1979, a girl student was screaming at petitioner, "you don't have to poke me, just tell me to shut up." Petitioner apologized but otherwise ignored the screams, and turned to the filmstrip projector to start the

lesson. The screaming continued for some time until the student saw the principal in the doorway.

18. On November 27, 1979, petitioner's class was in a disorganized and uncontrolled state. Some groups of students were working, others were talking, three boys were wrestling over a roll of masking tape and told to stop. Petitioner did not respond to the noise or movement but walked around talking to individual students. According to the lesson plans, the class should have been involved in a whole group activity.

20. On March 20, 1980, from 9:45 to 10:04 a.m., petitioner's eighth grade diagrammed sentences and later changed to math. Students shouted out answers or requests for help even though petitioner asked them to raise their hands. To get students' attention, she shouted over their voices, but this made little difference in the students' attention.

21. On April 15, 1980, questions posed by petitioner on square roots were formulated in such an unclear manner that they prompted loud and confusing total group responses. Petitioner did not manage the classroom environment adequately to provide for effective teaching and active learning. Students were allowed to behave in a disorderly manner (loud talking, laughter, jokes, mimicking) without any consequences or demands from petitioner that they stop this behavior.

22. On April 22, 1980, a parent requested that her child be transferred

from petitioner's class, on the grounds that there was no discipline in her classroom nobody understood the assignments she gave, and the students who want to study are unable to do so because of the disorder.

23. On May 8, 1978, and on numerous subsequent occasions, petitioner was informed of the need to correct her lack of control over the students and of concern with her relations with students and parents.

24. Petitioner's testimony that the events described in paragraph 18 occurred during a break between classes, and that the observation described in paragraph 21 was altered after it had been shown to her was false and not entitled to credit.

25. Throughout the time periods in issue here, petitioner was given the opportunity to respond in writing to the various charges against her, but never did so respond within the allotted time periods.

The California legislature mandates the evaluation and assessment of performance of certificated employees. See Article 11, Chapter 3, Part 25, California Education Code §§ 44660, et seq.

Section 44660 declares it to be the intent of the legislature that governing boards

establish a uniform system of evaluation and assessment of the performance of all certificated personnel in each school district of the state.

Section 44661 mandates the governing board to avail itself of the advice of the certificated instructional personnel in the development and adoption of the guidelines and procedures pursuant to this article.

Section 44662 enumerates the evaluation assessment guidelines which each district must follow:

> (a) The governing board of each school district shall establish standards of expected pupil achievement at each grade level in each area of study.
>
> (b) The governing board of each school district shall evaluate and assess certificated employee competency as it reasonably relates to:
>
> (1) The progress of pupils toward the standards established pursuant to subdivision (a).
>
> (2) The instructional techniques and strategies used by the employee.
>
> (3) The employee's adherence to

curricular objectives.

(4) The establishment and maintenance of a suitable learning environment, within the scope of the employee's responsibilities.

(c) The governing board of each school district shall establish and define job responsibilities for those certificated noninstructional personnel, including, but not limited to, supervisory and administrative personnel, whose responsibilities cannot be evaluated appropriately under the provisions of subdivision (b), and shall evaluate and assess the competency of such noninstructional certificated employees as it reasonably relates to the fulfillment of those responsibilities.

(d) The evaluation and assessment of certificated employee competence pursuant to this section shall not include the use of publishers' norms established by standardized tests.

(e) Nothing in this section shall be construed as in any way limiting the authority of school district governing boards to develop and adopt additional evaluation and assessment guidelines of criteria.

Section 44663 entitles the person being assessed to initiate a written response to the evaluation which shall become a permanent attachment to the employee's personnel file. A

personnel meeting is required with each certificated teacher and the evaluator in order to discuss the evaluation. This meeting must be held before the last school day of the school year.

Section 44664 requires evaluation of each certificated employee to be made at least once a year for probationary personnel and at least every other year for personnel with permanent status. This section further provides that if any evaluation contains an unsatisfactory rating, the certificated employee shall, as determined necessary by the employing authority, participate in a program designed to improve appropriate areas of the employee's performance, and to further pupil achievement and the educational objectives of the employing authority.

Clearly, the trial court's finding that the evaluation procedures met the legislative standards included a necessary finding that the

evaluation procedure met due process requirements.

A careful reading of the California appellate court's decision, however, indicates that the defendant governing board had not, in fact, established an evaluation procedure pursuant to the legislative mandate. Indeed, at the outset of the California appellate court decision, the principal issue is stated as follows:

> The principal issue on appeal is whether the district's failure to adopt uniform objective guidelines for evaluation and assessment of the classroom management performance of all its certificated personnel, pursuant to Education Code section 44660 et seq. (the Stull Act) precludes it from giving to the affected employee a valid 90-day written notice of charges of incompetency as required by section 44938.

California Teachers Assn. v. Governing Board, 144 Cal. App. 3d 27, 30, _____ Cal. Rptr. ____ (1983).

Finally, the appellate court upheld the trial court's independent judgment of the

evidence presented at the administrative hearing.

The Court is mindful of the recent decision of the Ninth Circuit in Jordan v. City of Lake Oswego, 734 F. 2d 1374 (9th Cir. 1984). In that case, the panel observed that:

> The City urges res judicata as an alternate ground for affirmance. It argues that Jordan's section 1983 action should have been joined with his two prior state court actions challenging his dismissal. Migra v. Warren City School District, ____ U.S. ____, 104 S. Ct. 892, 79 L.Ed. 2d 56 (1984), lends powerful support to the City's contention. There is serious question, however, whether either of these state actions was decided on the merits. There is also some question whether the conflicting positions taken by the state courts in Jordan's two actions resulted in Jordan's not being provided a full and fair opportunity to litigate his federal claim. See id, at ____, 104 S. Ct. at 896 (quoting Allen v. McCurry, 449 U.S. 90, 97-99, 101 S. Ct. 411, 416-417, 66 L. Ed. 2d 308 (1980)).

Jordan v. City of Lake Oswego, supra, at 1377.

In the instant case it is clear to the Court that the plaintiff's case was decided on the merits in state court, and that further,

the issue raised here was necessarily considered by the state courts at each level and decided adversely to the plaintiff. To state it differently, the nexus of operative facts were fully explored in the State Court proceedings. The State Courts were free to raise any constitutional issue encompassed by the evidence.

Accordingly, the defendants' motion for summary judgment is granted. Counsel for the defendants is directed to lodge an appropriate final judgment with the Court within twenty (20) working days from the date of this order.

DATED: January 3, 1985.

EDWARD DEAN PRICE

U.S. District Judge

D E C I D E D

FEBRUARY 5, 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MITSUE TAKAHASHI, Plaintiff, vs. BOARD OF TRUSTEES OF LIVINGSTON UNION SCHOOL DISTRICT, et al.,	NO. CV-F-83-501-EDP JUDGMENT

Defendants having moved for dismissal or for summary judgment dismissing the complaint and the motion having come before the Honorable Edward Dean Price, United States District Judge, and the Court thereafter on July 9, 1984, and the Court having handed down its opinion granting the defendants' motion for summary judgment dismissing the complaint, it is,

ORDERED, ADJUDGED, AND DECREED:

That the complaint be and it is hereby dismissed.

Dated: 2-5-85

EDWARD DEAN PRICE

United States District

Court Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MITSUE TAKAHASHI,	)	
	)	
Plaintiff-Appellant,	)	C.A. No. 85-1755
	)	
vs.	)	D.C. No. CV F-83-501
	)	
BOARD OF TRUSTEES OF LIVINGSTON UNION SCHOOL DISTRICT, FRED KISHI, DENNIS STEFFENSEN, JANET MARTIN, CHARLA SOTO, and ROBERT WEIMER in their official capacities as members of the BOARD OF TRUSTEES OF LIVINGSTON UNION SCHOOL DISTRICT,	)	OPINION
	)	
Defendants-Appellees.	)	

On Appeal From the United States District Court for the Eastern District of California
Hon. Edward Dean Price, District Judge, Presiding

Argued and Submitted November 13, 1985 - San Francisco, California

Before: GOODWIN, NELSON AND CANBY, Circuit Judges.

CANBY, Circuit Judge:

Mitsue Takahashi appeals the district

court's dismissal of her action on the ground of res judicata. The district court held that Takahashi's action, brought under 42 U.S.C. §§ 1981 AND 1983 against the Board of Trustees of Livingston Union High School District and individually named defendants (collectively "the District"), was barred by a prior unsuccessful litigation brought by Takahashi against the District in a California state court. We affirm.

FACTS

From August 1960 to November 1980, Mitsue Takahashi, a female United States citizen of Japanese ancestry, was employed as a high school teacher by the Livingston Union School District.

On June 26, 1980, Takahashi received a notice of accusation filed by the superintendent of the District alleging that cause existed for her dismissal because of her failure to maintain a suitable learning

environment in her junior high school classroom. Takahashi requested a hearing on this charge before the Commission on Professional Competence. On November 6, 1980, the Commission issued its two-to-one decision concluding that Takahashi was incompetent to teach and ordering her dismissal.

Takahashi commenced a proceeding in mandamus in the Superior Court of the State of California for the County of Merced to compel the Commission to set aside its decision. After receiving an adverse judgment, Takahashi appealed to the Court of Appeal for the Fifth Appellate District. The Court of Appeal found that (1) Takahashi had no right to reinstatement based on the District's failure to evaluate her performance pursuant to the Stull Act, California Education Code § 44660 et seq. and (2) substantial evidence supported the trial court's finding that cause existed for Takahashi's dismissal. California Teachers

Ass'n. v. Governing Board, 144 Cal. App. 3d 27, 192 Cal. Rptr. 358 (1983). Takahashi's subsequent petitions to the California Supreme Court for review and to the Supreme Court of the United States for a writ of certiorari were denied.

On November 10, 1983, having exhausted the channels for direct judicial review of her dismissal, Takahashi filed the present action in the United States District Court for the Eastern District of California. Takahashi's complaint alleged that the District violated her rights under the fourteenth amendment to the United States Constitution and 42 U.S.C. §§ 1981 and 1983 by (1) terminating her employment on account of her sex and ethnic origin, (2) terminating her employment on the basis of the impermissibly vague requirement that she maintain a suitable learning environment in her classroom, and (3) employing methods of evaluating her job performance that were

different from those employed to evaluate the performance of others similarly situated. Takahashi requested compensatory damages for lost wages and mental distress as well as punitive damages.

The District answered Takahashi's complaint by pleading inter alia the defense of res judicata. At the direction of the district court, the District moved for a judgment on the pleadings under Fed. R. Civ. P. 12(c) or summary judgment under rule 56(c). On January 3, 1985, the district court granted the District's motion for summary judgment and dismissed Takahashi's complaint on the ground that her action was barred by res judicata.

ANALYSIS

I. The District's Failure to Submit into Evidence the Record of the Prior Adjudication

Takahashi initially contends that the district court erred in holding that her claims

were barred by res judicata because the District had failed to submit into evidence the record established by the state trial court. We reject this contention.

In support of her position that the submission of the record of the prior adjudication is a condition precedent to a finding of res judicata, Takahashi cites Guam Investment Co. v. Central Building, Inc., 288 F. 2d 19 (9th Cir. 1961). In Guam Investment, we stated,

> It appears to us that before an action may be summarily dismissed on the ground of res judicata the ends of justice require as a minimum that the defense of res judicata appear from the face of the complaint or that the record of the prior case be received in evidence.

Id. at 24. Takahashi erroneously construes this language as imposing a strict pleading or evidentiary requirement for the assertion of the res judicata defense.

In Guam Investment, we were faced with "uncontroverted allegations" about "matters

which occurred subsequent to the judgment . . . in the prior case," id., and were concerned that such allegations not be disposed of upon a bald pleading of res judicata, id. at 23. In the present case, there are no such outstanding factual allegations and the District has submitted sufficient evidence to allow the evaluation of its res judicata defense. When the moving party has "introduce[d] a record sufficient to reveal the controlling facts and pinpoint the exact issues litigated in the prior action," there is no need for the entire record of the prior litigation to be submitted into evidence. Hernandez v. City of Los Angeles, 624 F. 2d 935, 937 (9th Cir. 1980). See also Jones v. Gann, 703 F. 2d 513, 515 (11th Cir. 1983) (res judicata defense may be raised "by introducing sufficient information into the record to allow the court to judge the validity of . . . the defense"). As will be shown, in the present case we are able to

evaluate the merits of the District's res judicata defense from the evidence on hand.

II. Preclusion of Section 1983 Claims by State Court Judgments

Takahashi next contends that her claims brought under section 1983 may not be barred by a prior unsuccessful litigation in California state court. In Allen v. McCurry, 449 U.S. 90 (1980), the Supreme Court considered whether a § 1983 claim brought in federal court was subject to collateral estoppel by a prior state court judgment where the state court had provided the federal plaintiff a full and fair opportunity to litigate his federal claims. The Court rejected the argument that Congress in enacting 42 U.S.C. § 1983 "intended to repeal or restrict the traditional doctrines of preclusion." Id. at 98. In Migra v. Warren City School District Board of Education, 104 S. Ct. 892, 897-98 (1984), the Court explicitly extended the rule of Allen v. McCurry to cover

claim preclusion, the aspect of res judicata asserted by the District, as well as collateral estoppel.

Takahashi seeks to distinguish Migra on the grounds that the plaintiff in Migra, unlike herself, could have proceeded first in a federal court. In Allen, however, the Supreme Court found that collateral estoppel was applicable to the plaintiff's claims notwithstanding the fact that the plaintiff, a former state criminal defendant, was forced to litigate his federal claim in the first instance in state court on pain of losing his right to habeas corpus relief. The Court stated,

> There is . . . no reason to believe that Congress intended to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state court simply because the issue arose in a state proceeding in which he would rather not have been engaged at all.

Id. 449 U.S. at 104. We similarly conclude

that any procedural disadvantages which might have accrued to Takahashi had she attempted first to litigate her § 1983 claims in a federal forum are insufficient to justify an exception to the traditional doctrines of preclusion. 1/

III. California Law of Res Judicata

Under the Federal Full Faith and Credit Statute, 28 U.S.C. § 1728, "a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." Migra, 104 S. Ct. at 896. Accordingly, we look to California law to determine the claim-preclusive effect that the judgment entered in Takahashi's first suit

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1/ Takahashi relies on a contrary implication appearing in Migra, 104 S. Ct. at 898 n. 7. That footnote is dictum, consisting primarily of Justice Blackmun's explanation and reconciliation of his positions in Allen, from which he dissented, and Migra, which he authored.

has upon her present action.

Under California law, "[a] valid judgment on the merits in favor of a defendant serves as a complete bar to further litigation on the same cause of action." Slater v. Blackwood, 15 Cal. 3d 791, 795, 126 Cal. Rptr. 225, 226, 543 P. 2d 593, 594 (1976); see 3 Witkin California Procedure Judgment § 249 (1985). To determine the scope of causes of action, California courts employ the "primary right theory." Under this theory, "the violation of one primary right gives rise to a single cause of action." Slater, 15 Cal. 3d at 795, 126 Cal. Rptr. at 226, 543 P. 2d at 594. Because we conclude that Takahashi's present action is based on the violation of the same primary right as her earlier action, we find Takahashi's present action barred.

Takahashi's first action was based on the invasion of her contractual right to employment by the District. In that litigation, Takahashi

challenged the Commission's finding that cause existed for the termination of her contract. 2/ Contractual rights are a species of primary rights. See Holmes v. David H. Bricker, Inc., 70 Cal. 2d 786, 76 Cal. Rptr. 431, 452 P. 2d 647 (1969) (breach of express warranty creates single cause of action); Sawyer v. First City Financial Corp., 124 Cal. App. 3d 390, 177 Cal. Rptr. 398 (1981) (failure to pay note distinct violation from tortious destruction of note's value).

In the present action, the identical primary right -- the contractual right to employment -- is at stake. In determining the primary right at stake, "the significant factor is the harm suffered." Argarwal v. Johnson,

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2/ Takahashi also challenged her dismissal on the ground that the Commission's evaluation of her performance was not in compliance with the Stull Act, California Education Code §44660 et seq. To find Takahashi's present action barred, we need not rely on the primary right underlying this claim.

25 Cal. 3d 932, 955, 160 Cal. Rptr. 141, 155, 603 P.2d 58, 72 (1979). Absent termination of her employment contract, Takahashi suffered no harm. Takahashi's allegations of mental distress caused as a result of her dismissal do not present a separate injury. 3/ Rather, any such distress would be a consequence of the District's violation of Takahashi's primary contractual right. Consequential damages cannot support a separate cause of action. Reichert v. General Insurance Co., 68 Cal. 2d 822, 832, 69 Cal. Rptr. 321, 326, 442 P. 2d 377, 382 (1968); compare Argarwal v. Johnson, 25 Cal. 3d at 955 (action for intentional infliction of emotional distress resulting from unlawful discharge not barred because damages under Title VII not available for mental

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3/ We do not read Takahashi's complaint as alleging any mental distress caused by the District's evaluation of her performance independent of that caused by the District's termination of her employment.

distress).

We reject Takahashi's characterization of the primary rights invaded by the District as,

> the right to be treated in the same manner as a person of non-Japanese ancestry in the dismissal process, and . . . the right to be treated in the same manner as a person of non-Japanese ancestry and to be judged according to constitutionally adequate standards in the teacher evaluation process.

(Emphasis in original.) While stating the primary right asserted in her first action in constitutional terms, Takahashi has failed to allege a new injury. "Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim of relief." Slater, 15 Cal. 3d at 795, 126 Cal. Rptr. at 226, 543 P. 2d at 594-95. By invoking the Constitution and § 1983, Takahashi has merely presented a new legal theory upon which she seeks recovery. See City of Los Angeles v. Superior Court, 85 Cal. App. 3d. 143, 155, 149 Cal. Rptr. 320, 326

(1978) (section 1983 action barred where it simply asks jury to look at merits of earlier conversion action from different angle); see also Mattson v. City of Costa Mesa, 106 Cal. App. 3d 441, 164 Cal. Rptr. 913 (1980) (primary right at stake in § 1983 action same as in previous tort action).

IV. Adequacy of Prior Forum

Lastly, Takahashi objects to the district court's finding of res judicata on the ground that her hearing before the Commission on Professional Competence did not allow "a full presentation of the claim[s]" she now wishes to assert in federal court. Takahashi misapplies this defense to res judicata. The procedural adequacy of her hearing before the Commission is irrelevant. The judgment that bars her present action is not the decision of the Commission, but the judgment of the Superior Court of Merced County. Because Takahashi could have raised her constitutional claims

before the Commission, see California Government Code § 11506(a)(5), there is no doubt that the trial court had jurisdiction to hear these claims under California Education Code § 44945. In addition, the trial court was fully competent to decide the merits of any claims raised before it. Thus, Takahashi was afforded an opportunity to make a full presentation of her constitutional claims.

The judgment of the district court dismissing Takahashi's action on the ground of res judicata is AFFIRMED.

APPENDIX B

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1981

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be

subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

CALIFORNIA EDUCATION CODE § 44660

It is the intent of the Legislature that governing boards establish a uniform system of evaluation and assessment of the performance of all certificated personnel within each school district of the state, including schools conducted or maintained by county superintendents of education. The system shall involve the development and adoption by each school district of objective evaluation and assessment guidelines which may, at the discretion of the governing board, be uniform throughout the district or, for compelling reasons, be individually developed for territories or schools within the district, provided that all certificated personnel of the

district shall be subject to a system of evaluation and assessment adopted pursuant to this article.

This article does not apply to certificated personnel who are employed on an hourly basis in adult education classes.

CALIFORNIA EDUCATION CODE § 44662

(a) The governing board of each school district shall establish standards of expected pupil achievement at each grade level in each area of study.

(b) The governing board of each school district shall evaluate and assess certificated employee competency as it reasonably relates to:

(1) The progress of pupils toward the standards established pursuant to subdivision(a).

(2) The instructional techniques and strategies used by the employee.

(3) The employee's adherence to curricular objectives.

(4) The establishment and maintenance of a suitable learning environment within the scope of the employee's responsibilities.

(c) The governing board of each school district shall establish and define job responsibilities for those certificated noninstructional personnel, including, but not limited to, supervisory and administrative personnel, whose responsibilities cannot be evaluated appropriately under the provisions of subdivision (b), and shall evaluate and assess the competency of such noninstructional

certificated employees as it reasonably relates to the fulfillment of those responsibilities.

(d) The evaluation and assessment of certificated employee competence pursuant to this section shall not include the use of publishers' norms established by standardized tests.

(e) Nothing in this section shall be construed as in any way limiting the authority of school district governing boards to develop and adopt additional evaluation and assessment guidelines or criteria.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF CALIFORNIA

..TSUE TAKAHASHI,	) NO. CV-F-83-501 EDP
Plaintiff,	) COMPLAINT FOR DAMAGES
vs.	) AND INJUNCTIVE RELIEF
	) FOR VIOLATION OF THE
	) FOURTEENTH AMENDMENT
BOARD OF TRUSTEES OF	) TO THE UNITED STATES
LIVINGSTON UNION SCHOOL	) CONSTITUTION,
DISTRICT; FRED KISHI,	) 42 U.S.C. §§ 1981
DENNIS STEFFENSEN,	) and 1983
JANET MARTIN, CHARLA	)
SOTO, and ROBERT WEIMER,	)
in their official	)
capacities as members	)
of the BOARD OF	)
TRUSTEES OF LIVINGSTON	)
UNION SCHOOL DISTRICT,	)
	)
Defendants.	)

JURISDICTION

1. This action is brought to redress violations of rights secured by 42 U.S.C. §§ 1981 and 1983.

2. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1343(4).

PARTIES

3. Plaintiff MITSUE TAKAHASHI is a female citizen of the United States of Japanese ancestry residing at 6641 North Sultana Drive, Livingston, California.

4. Defendant BOARD OF TRUSTEES OF LIVINGSTON UNION SCHOOL DISTRICT is the governing board of the LIVINGSTON UNION SCHOOL DISTRICT, a school district duly organized and existing under the laws of the State of California.

5. Defendants FRED KISHI, DENNIS STEFFENSEN, JANET MARTIN, CHARLA SOTO, and ROBERT WEIMER are sued in their official capacities as the members of the BOARD OF TRUSTEES OF THE LIVINGSTON UNION SCHOOL DISTRICT, a school district duly organized and existing under the laws of the State of California.

FIRST CLAIM

6. Plaintiff MITSUE TAKAHASHI was

employed by defendant BOARD OF TRUSTEES OF LIVINGSTON UNION SCHOOL DISTRICT in the position of teacher from September 1959 to November 14, 1980. During her entire tenure with LIVINGSTON UNION SCHOOL DISTRICT, plaintiff performed her job duties in a competent and exemplary manner. Her students consistently met and surpassed the academic goals set by the administration of the LIVINGSTON UNION SCHOOL DISTRICT.

7. On November 14, 1980, defendants terminated plaintiff's employment for failure to maintain a suitable learning environment in her classroom.

8. Defendants' termination of plaintiff's employment was on account of her sex and her ethnic origin.

9. In terminating plaintiff's employment defendants acted under color of law and with the intent and purpose of depriving plaintiff of the guarantee of equal protection

and benefit of the laws secured by the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §§ 1981 and 1983.

10. As a direct and proximate result of defendants' aforesaid termination of plaintiff's employment she lost wages and benefits and will continue to lose wages and benefits in the future.

11. As a direct and proximate result of defendants' aforesaid termination of plaintiff's employment plaintiff has suffered emotional and mental distress and anguish, embarrassment, mortification, humiliation, and indignity, all to her damage in the sum of $500,000.00.

12. Defendants' termination of plaintiff's employment was intentional, malicious, and oppressive, and plaintiff is entitled to exemplary and punitive damages in the sum of $750,000.00.

13. Plaintiff has no plain, adequate,

and complete remedy at law to redress the wrongs alleged, and this suit for injunctive relief is her only means of securing adequate relief. Plaintiff is now suffering and will continue to suffer irreparable harm from defendants' actions as set forth herein unless and until enjoined by the court.

SECOND CLAIM

14. Plaintiff refers to Paragraphs 1 through 7 and 10 through 13 of the First Claim and incorporates them herein as if set forth in full.

15. The requirement that plaintiff maintain a suitable learning environment in her classroom was so impermissibly vague that defendants' termination of plaintiff's employment for violation of said requirement deprived plaintiff of her rights to liberty and property without due process of the law secured by the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983.

16. Defendants acted under color of law and with the intent to deprive plaintiff of the aforesaid rights.

THIRD CLAIM

17. Plaintiff refers to Paragraphs 1 through 7 and Paragraphs 10 through 13 of the First Claim and Paragraphs 14 through 16 of the Second Claim and incorporates them herein as if set forth in full.

18. Defendants' methods of evaluating plaintiff's job performance were different than those utilized to adjudge the performance of all other similarly situated teachers. In imposing the aforesaid differential treatment defendants acted under color of law and with the intent and purpose of depriving plaintiff of her rights to equal protection of the laws and due process of law guaranteed by the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983.

Plaintiff hereby demands a jury trial.

WHEREFORE, plaintiff prays judgment as follows:

1. Wages and benefits lost as a result of defendants' termination of plaintiff's employment, according to proof, plus interest at the legal rate;

2. Compensatory damages in the sum of $500,000.00;

3. Exemplary and punitive damages in the sum of $750,000.00;

4. Preliminary and permanent injunction reinstating plaintiff to the position of teacher in defendants' employ;

5. Attorneys fees and costs of suit;

6. Such other and further relief as the court deems proper and just.

Dated: November 10, 1983.

FRAMPTON, KARSHMER & KESSELMAN

MARY LOUISE FRAMPTON
Attorney for Plaintiff,
MITSUE TAKAHASHI

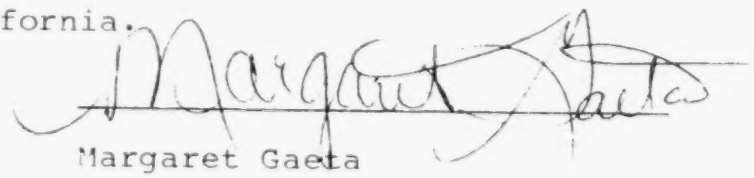
CERTIFICATE OF SERVICE

I hereby certify that printed copies of the Petition for Writ of Certiorari to the Court of Appeal for the Ninth Circuit for Petitioner Mitsue Takahashi in the above-captioned case have been served upon those parties listed below by placing the same in the United States Mail, postage prepaid, property addressed, this 22nd day of April, 1986, to:

Clerk of the Supreme Court
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543
(40 copies)

Janae H. Novotny
ATKINSON, ANDELSON, LOYA, RUUD
& ROMO
Attorneys at Law
1811 Santa Rita Road, Suite 102
Pleasanton, CA 94566

Executed this 22nd day of April, 1986, at Fresno, California.



Margaret Gaeta